

**OFFICE OF ADMINISTRATIVE LAW**

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**SUSAN LAPSLEY**  
Director

ENDORSED FILED  
IN THE OFFICE OF

2009 APR 27 AM 11:59



*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: April 27, 2009

To: Arthur Weeks

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 8(S)**  
**(CTU2009-0113-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum establishing a new Friday visiting program.

On January 13, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memorandum establishing a new program permitting visiting on Fridays constitutes an underground regulation. The alleged rule is contained in a memorandum dated June 23, 2006, titled "Addition of Friday Visiting for General Population Disciplinary Free Inmates" (Memorandum). The Memorandum establishes a third day visiting program on Fridays for inmates in the general population who have remained disciplinary free for 90 days. This Memorandum was issued by the warden at California State Prison, Corcoran, and is attached hereto as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,<sup>1</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>2</sup> Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

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<sup>1</sup> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

<sup>2</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

The Memorandum establishes:

1. A third visiting day on Fridays; and
2. Limits access to the Friday visiting day to inmates who are disciplinary free for 90 days.

We will address each element separately.

### **Third Day Visiting on Friday**

The establishment of the third visiting day on Friday is in compliance with California Code of Regulations, title 15, section 3172.5 (b) which requires:

(b) Each institution head shall develop an operational supplement that includes the respective visiting schedules as follows:

(1) Regular Visiting Days: Four days (Thursday through Sunday); or *Three days (Friday through Sunday)*; or Two days (Saturday and Sunday);

....

(Emphasis added.)

As noted above, the definition of “regulation” in Government Code section 11342.600 includes “every rule, regulation, order, or standard of general application ... adopted by any state agency to *implement, interpret, or make specific* the law enforced or administered by it, or to govern its procedure.” (Emphasis added.)

California Code of Regulations, title 15, section 3172.5 (b) requires that a regular visiting schedule of three days must permit visiting on Friday through Sunday. The third day visiting program established by California State Prison, Corcoran, complies with section 3172.5 without further implementing, interpreting or making specific section 3172.5. The third day visiting program, therefore, does not meet the definition of “regulation” in Government Code section 11342.600.

### **Discipline Free for 90 Days**

Generally, a rule which meets the definition of “regulation” in Government Code section 11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Penal Code section 5058, subdivision (c), establishes exemptions expressly for the California Department of Corrections and Rehabilitation (CDCR):

(c) The following are deemed not to be “regulations” as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director applying solely to a particular prison or other correctional facility....

This exemption is called the “local rule” exemption. It applies only when a rule is established for a single correctional institution.

In *In re Garcia* (67 Cal.App.4<sup>th</sup> 841, 845), the court discussed the nature of a “local rule” adopted by the warden for the Richard J. Donovan Correctional Facility (Donovan) which dealt with correspondence between inmates at Donovan:

The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

....

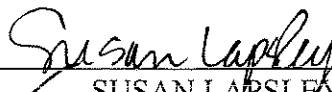
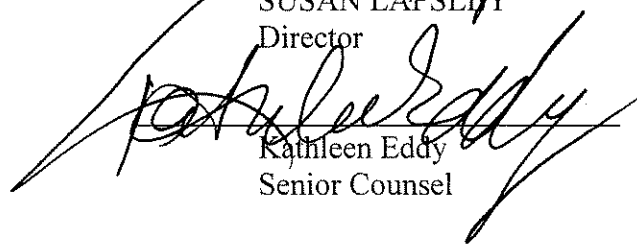
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the limitation of the third day visiting program to inmates who have been discipline free for 90 days applies solely to the inmates of the California State Prison, Corcoran. The Memorandum was issued by Derral G. Adams, the warden of California State Prison, Corcoran. Inmates housed at other institutions are controlled by those other institutions' discipline criteria for similar visiting programs. The rule you challenged was issued by California State Prison, Corcoran, and applies only to inmates at the California State Prison, Corcoran.

### Conclusion

Therefore, establishment of the third visiting day on Friday complies with California Code of Regulations, title 15, section 3172.2 and does not meet the definition of "regulation" in Government Code section 11342.600. The limitation of the third day visiting program to inmates who have been discipline free for 90 days is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1).<sup>3</sup>

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

  
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SUSAN LAPSLEY  
Director  
  
\_\_\_\_\_  
Kathleen Eddy  
Senior Counsel

Copy: Matthew Cate  
John McClure

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<sup>3</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.
  - (D) The challenged rule has expired by its own terms.
- (E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.** (Emphasis added.)

# Exhibit A

State of California

Department of Corrections and Rehabilitation

## Memorandum

Date : June 23, 2006

To : All Staff

Subject: **ADDITION OF FRIDAY VISITING FOR GENERAL POPULATION DISCIPLINARY FREE INMATES**

Effective Friday July 7, 2006, California State Prison-Corcoran will begin a Friday General Population visiting program for inmates who have remained disciplinary free for a period of 90 days. This program will be available only to Level I, Facilities 3A, 3B, 3C and Protective Housing Unit (PHU) inmates. Security Housing Unit and Administrative Segregation inmates are excluded based on their current housing assignment.

Friday visiting will be from 1200 to 2000 hours. PHU inmates must schedule their visit no later than 1300 hours the day prior. In order to establish an ineligibility list, each Facility, excluding 4B, will be required to forward a photo copy of their disciplinary logs for the months of April, May and June to the Visiting Lieutenant on July 1, 2006.

The Visiting Lieutenant will create an ineligibility list based on this information. All disciplinary reports heard after July 1, 2006, wherein the inmate was found guilty of either an administrative or serious offense, must be shared with visiting staff. When there is a finding of guilt, the hearing officer is responsible for ensuring that a CDC-128B documenting that finding is forwarded immediately to the Visiting Lieutenant. The CDC-128B should read similar to the following;

*Inmate \_\_\_\_\_ CDCR # \_\_\_\_\_ was found guilty of a serious/administrative offense on \_\_/\_\_/\_\_. As such he is no longer eligible for the institution's Friday visiting program for the next 90 days (commencing from the hearing date).*

\_\_\_\_\_  
Hearing Officer Signature

\_\_\_\_\_  
Date

All CDC-128B hearing result chrono's shall be delivered on Mondays to the Visiting Lieutenant's office for processing. It is imperative that this new visiting program be shared with the inmate population immediately. It is anticipated that flyers/posters will be generated within a few days for posting in your respective units.

If you have any questions or concerns, please contact R. Davis, Custody Captain at extension 5545.

*Original signed by James D. Hartley*

DERRAL G. ADAMS  
Warden  
California State Prison-Corcoran

*DIST TO H/US  
POST ON 444  
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